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IN THE

# Supreme Court of the United States

October Term, 1979

No. 78-1702

SOCIALIST WORKERS PARTY, ET AL.,

*Petitioners,*

—v.—

THE ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

*Respondents.*

## PETITIONERS' REPLY MEMORANDUM

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**PETITIONERS' REPLY MEMORANDUM**

Respondents' contention that "it has long been accepted that" a party to on-going litigation may appeal from a civil contempt order and that "the Second Circuit stands alone in holding that a party cannot" do so (Br. in Opposition at 9) is false<sup>1</sup> and flies in the face of the Court's longstanding rule that a civil contempt order against a party litigant is interlocutory in nature and therefore not appealable. See *Fox v. Capital Co.*, 299 U.S. 105; *Doyle v. London Guarantee & Accident Co.*, 204 U.S. 599. Since the First Judiciary Act was passed in 1789,<sup>2</sup> both the Congress and the courts have repeatedly recognized that a final judgment is a necessary prerequisite to review by appeal. See e.g., *Kerr v. United States District Court*, 426

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<sup>1</sup> See e.g., *In re Murphy*, 560 F.2d 326, 332 n.10; *Fenton v. Walling*, 139 F.2d 608, 609 n.10, cert. denied, 321 U.S. 798; *Apex Hosiery Co. v. Leader*, 102 F.2d 702, 703 (3d Cir. 1939) (*per curiam*), *aff'd on other grounds* 310 U.S. 469.

<sup>2</sup> Sections 21, 22, 25 of the Act of September 24, 1789, 1 Stat. 73, 83-85.

U.S. 394, 402-403; *United States v. Ryan*, 402 U.S. 530, 532-533; *Cobbledick v. United States*, 309 U.S. 323, 324-325. The purpose of the finality requirement is to prevent piecemeal review which delays the principal litigation and overburdens the appellate courts. See *American Express Warehousing, Ltd. v. Transamerican Insurance Co.*, 380 F.2d 277, 280 (2d Cir. 1967).

Though courts have carved out several narrow exceptions to the final judgment rule, none are applicable to the case at bar. See e.g., *United States v. Ryan*, 402 U.S. at 532-533; *Cohen v. Beneficial Industrial Loan Corp.*, 377 U.S. 541; *Alexander v. United States*, 201 U.S. 117. The Second Circuit characterized the exceptions to the final judgment rule as being those situations "where the interlocutory nature of the order is no longer present" and offered the following examples: a civil contempt citation issued to a *non-party* or a civil contempt citation to a party where the main case is effectively terminated or where the contempt proceeding is the sole court action involved. *International Business Machines Corp. v. United States*, 493 F.2d 112, 115 n.1 (2d Cir. 1973). This Court has also recognized the distinction between civil and criminal contempt and held that only the latter is a final judgment which is subject to appeal. *Doyle v. London Guarantee & Accident Co.*, 204 U.S. at 604-605.

The three cases cited by the government in support of its argument to obtain review by appeal all fit neatly within the exceptions to the rule but are clearly inapposite in the instant case. None of the cases permitted appeal by a party to on-going litigation from a civil contempt order.

The first case cited in this connection, *United States v. Ryan*, concerned an appeal by a witness before a federal

grand jury seeking relief from the burden of producing documents pursuant to a subpoena *duces tecum*. While the Supreme Court denied the witness the right to appeal at that stage of the proceedings, the Court pointed out that a grand jury *witness* could appeal from a civil contempt adjudication. 402 U.S. at 532.

*Ryan*, however, in no way offends the policy underlying the final judgment rule. The evils attendant upon an interlocutory appeal are simply not present when there are no other pending court proceedings. Moreover, a grand jury witness might be denied any opportunity to obtain appellate review if an appeal was not allowed from a contempt citation. See *United States v. Ryan*, 402 U.S. at 532-522; *Cobbledick v. United States*, 309 U.S. at 324-325. By contrast, a party litigant is assured the right to appeal from an adverse final judgment. By delaying the right to appeal until final judgment, however, appellate courts are spared the necessity of reviewing judgments that are ultimately favorable to the party seeking appeal, or reviewing cases that are settled, and the principal suit is not burdened by appeals undertaken for purposes of harassment or delay.

The other two cases cited by the government concerned appeals by non-parties to the litigation. In *Alexander v. United States*, 201 U.S. 117, the Court denied the right of a non-party witness to appeal from a court order requiring him to testify and produce documents, overriding his assertion of a Fifth Amendment privilege. 201 U.S. at 122. While the Court acknowledged that the witness could appeal from a subsequent civil contempt adjudication, *ibid.*, it in no way suggested that a *party* held in civil contempt could appeal prior to final judgment. The Court's decision later in the same year in *Doyle v. London Guarantee &*

*Accident Company* specifically held that a party could not do so.

*Schleper v. Ford Motor Co.*, 585 F.2d 1367 (8th Cir. 1978) offers no more support to the respondent, for two reasons. First, *Schleper* was an appeal from a criminal contempt citation, which is, in and of itself, a final judgment from independent proceedings between the contemnor and the government as sovereign. *Schleper v. Ford Motor Co.*, 585 F.2d at 1371-1373. Cf., *Doyle v. London Guarantee Co.*, 204 U.S. at 605, citing *Re Christensen Engineering Co.*, 194 U.S. 324. Second, the contemnor in *Schleper* was not a party to the original suit, but was an attorney; accordingly appeal of his contempt citation did not delay the pending litigation.

The controlling significance of the distinction between parties and non-parties was reiterated by the Eighth Circuit in *In re Murphy*, 560 F.2d 326, 332 n.10 (8th Cir. 1977). Cf., *International Business Machines Corp. v. United States*, 493 F.2d 112 (2d Cir. 1973), cert. denied, 416 U.S. 979. In *Murphy* the court rejected the argument that the close relationship between a party and his attorney renders the attorney a *de facto* party and therefore the court permitted the attorney, as a non-party to the litigation, to present his appeal from a civil contempt order.

*Schleper* and *Murphy* lend no support to the Attorney General in this case because he does not appear in this matter in the posture of an attorney. The Attorney General is indisputably a party in interest in this matter. The complaint charges the Attorney General and his department with serious violations of the plaintiffs' constitutional rights. Equitable relief is sought, which, if granted, would run against the Attorney General. Extensive discovery

has been sought of and by the Attorney General as a party defendant. The Attorney General, by his affidavit (Br. in Opposition at 1a) acknowledges that he exercises ultimate responsibility for the files in question, not in his capacity as attorney for the government, but rather in his official capacity as head of the Department of Justice. Thus, the defendant Attorney General's decision not to turn over the files clearly was not the "advice" of a mere lawyer, but rather was the act of a senior executive official in ostensible furtherance of his duties.

In a final effort to justify its claim for appellate review, the government again raises the argument, squarely rejected by the court of appeals (7a-8a), that the Attorney General is entitled to appeal under the special exception to the final judgment rule recognized in *United States v. Nixon*, 418 U.S. 683, 691-692. *Nixon* is clearly distinguishable from the case at bar in two decisive respects.

First, the government's reliance on *Nixon* ignores the unique factors that the Supreme Court found in that case. The controlling consideration was the singular significance of the role of the Chief Executive in the American system of government. The President not only is the head of the Executive Department, he "is the Executive Department." *Mississippi v. Johnson*, 4 Wall. 475, 500; cf., *Myers v. United States*, 272 U.S. 52, 123. Moreover, it has been true since the earliest days of the Republic that neither cabinet nor sub-cabinet officials are embodied with the attributes of sovereignty associated with the Presidency and thus have not been accorded the judicial deference due the President. See *Marbury v. Madison*, 1 Cranch 137, 165; *Kendall v. United States ex rel. Stokes*, 12 Pet. 524, 610. In contrast, courts have expressly acknowledged that there is no impediment to holding a "high officer of state" in contempt for refusing to comply with a court order di-

recting the production of documents. See *Bank Line, Ltd. v. United States*, 163 F.2d 133, 137 (2d Cir. 1947); see also, *Sawyer v. Dollar*, 190 F.2d 623 (D.C. Cir. 1951), vacated as moot, 344 U.S. 806.

Second, it should be noted that in *Nixon* the President appeared as a third party witness, not a party defendant. As such, review would have been appropriate from an adjudication of contempt,<sup>3</sup> see *United States v. Ryan*, 402 U.S. at 532-533, but as the Supreme Court acknowledged, it would be "peculiarly inappropriate . . . (t)o require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling. . . ." *United States v. Nixon*, 418 U.S. at 691.

The Attorney General, as a party defendant, appears before this Court on a much different footing, because he is not entitled to review by appeal until a final judgment is rendered in this case. Thus an appeal at this juncture would not merely relieve the Attorney General of the necessity of placing himself in contempt. Rather, by allowing the Attorney General to forego the necessity of awaiting final judgment, the Court would deal a crippling blow to the final judgment rule, by permitting the govern-

<sup>3</sup> The government's contention that two courts of appeal would have granted the Attorney General the right of appellate review before he was held in contempt is misleading in this context, since both cases involved the issuance of a writ of mandamus and not review on appeal. See *Usery v. Ritter*, 547 F.2d 528 (10th Cir. 1977); *United States v. Hemphill*, 369 F.2d 539 (4th Cir. 1966). In both cases the writ of mandamus was issued because the courts of appeals found the underlying discovery order to have been clearly erroneous. *Usery v. Ritter*, 547 F.2d at 532; *United States v. Hemphill*, 369 F.2d at 543. By contrast, the Second Circuit, in an earlier decision, found the underlying discovery order in the instant case to have been within the discretion of the district court. 565 F.2d 19, 23 (Pet. at 35a-36a).

ment the privilege of piecemeal review and condoning a fourteen month long delay of this litigation.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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